United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2229 B no service

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK REX PIGMAN,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Vermont,
Honorable Albert W. Coffrin, District Judge

BRIEF FOR APPELLANT PIGMAN

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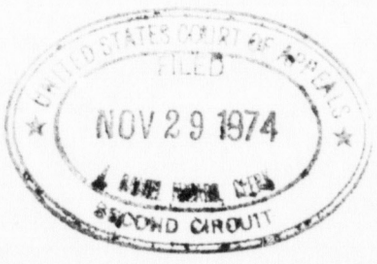

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D. Whether the unjust disparity between Appellant's nine year sentence and codefendant Kloberdance's five year sentence should be corrected by this Court in the exercise of its supervisory power?

II. STATEMENT OF THE CASE

Jack Rex Pigman was convicted by a jury in the United States District Court for the District of Vermont on December 14, 1967, the late Honorable Ernest W. Gibson presiding, on three counts: Count I, causing a falsely made and forged security to be transported in interstate commerce (18 U.S.C.A. §2314); Count II, conspiring to violate section 2314 (18 U.S.C.A. §371); and Count III, possessing an unregistered sawed-off shotgun (26 U.S.C.A. §§5841, 5851). Sentence was imposed by Judge Gibson on January 22, 1968, as follows: Count I, the ten year maximum; Count II, the five year maximum (consecutive); and Count III, the five year maximum (consecutive; execution suspended, probation for five years to begin upon completion of sentences on Counts I and II).

Count III thereafter was dismissed by Judge Gibson on December 19, 1968, on the authority of Haynes v. United States, 390 U.S. 85 (1968). The convictions on Counts I and II were affirmed by this Court on August 21, 1969. United States v. Rathburn, 414 F.2d 767 (2d Cir. 1969), cert. denied, 399 U.S. 912 (1970). On November 6, 1970, the late Honorable Bernard J. Leddy, then Chief Judge of the United States District Court for the District

of Vermont, pursuant to a motion for reduction of sentence under Fed. R. Crim. P. 35, modified the original sentence to the extent that the sentence on Count II was reduced to three years to be served concurrently with the ten year sentence on Count I.

On September 11, 1973 Appellant Pigman filed in forma pauperis a pro se motion under 28 U.S.C.A. §2255 to vacate and set aside the judgments and convictions on Counts I and II. Counsel was assigned by the Honorable James S. Holden, Chief Judge of the United States District Court for the District of Vermont. The Government's motion to dismiss the petition was granted and denied in part by Judge Holden on March 15, 1974. Various exhibits and affidavits were filed by Appellant Pigman to establish his surviving claim, which was that the sentences on Counts I and II were illegal because the presentence report had contained numerous convictions obtained while Appellant was without the assistance of counsel.

On May 31, 1974 Appellant filed two motions in anticipation of an order for resentencing. One motion was for deletion of convictions, obtained subsequent to the original sentencing, from the presentence report to be

used upon resentencing. The second motion was for transfer of the case to the docket of the Honorable Albert W. Coffrin. A proposed order for resentencing was also filed, which would have directed that the presentence report exclude reference to certain listed convictions Appellant had shown to be invalid. The purpose of these concurrent filings was to insure that the many prior invalid and improper convictions, as well as the subsequent convictions, would not enhance Appellant's punishment on resentencing for the two original valid counts. The Government also filed a proposed order for resentencing, which specified what convictions the presentence report should include.

On June 6, 1974 Chief Judge Holden ordered resentencing on Counts I and II on the authority of United States v. Tucker, 404 U.S. 443 (1972). Transferral to Judge Coffrin's criminal docket was also ordered, as was a presentence report, but no ruling was made at that time on the motion for deletion of subsequent convictions from the new presentence report.

On August 19, 1974, following earlier resentencing hearings on August 5 and 6, 1974, Judge Coffrin denied the motion for deletion and entered an Order Reducing Sentence which "modified" Appellant's sentence on Count I from ten to nine years. The sentence on Count

II was acknowledged as having been served by its terms. This appeal is taken from the Order Reducing Sentence.

The facts relevant for review consist principally of facts and allegations, appearing in the presentence report and the transcript of the original sentencing proceeding, which Judge Coffrin explicitly considered and relied upon in resentencing Mr. Pigman on August 19, 1974. The facts pertinent to each of the several issues presented for review, therefore, will be set forth at the beginning of the argument on each issue.

III. SUMMARY

Following an order that Appellant be resentenced because the original sentencing judge considered convictions obtained while Appellant was without the assistance of counsel, Appellant was resentenced in a procedure in which the resentencing judge explicitly considered and gave weight to: (1) similarly illegal juvenile convictions (2) convictions obtained subsequent to the original sentencing; and (3) the trial judge's erroneous and unfounded accusation that Appellant was a ringleader of those involved in the underlying criminal conduct.

Resentencing is again required. The rule in United States v. Tucker, 404 U.S. 443 (1972), requires it because the invalid juvenile convictions influenced and enhanced Appellant's sentence. The judge's consideration of the subsequent convictions subjected Appellant to double punishment for a single offense in violation of the fifth amendment. Ex parte Lange, 18 Wall. 163 (1874). The ringleader charge was a materially false assumption; the judge's consideration of it in imposing sentence denied Appellant due process of law. Townsend v. Burke, 334 U.S. 736 (1948); United States v. Powell, 487 F.2d 325 (4th Cir. 1973).

Finally, even if resentencing is not required, the gross disparity between Appellant's sentence and that of a codefendant with equal criminal involvement and a similar background stands to be corrected. United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

IV. ARGUMENT

A. THE SENTENCE ON COUNT I IS ILLEGAL AS FOUNDED UPON PRIOR CONSTITUTIONALLY INVALID JUVENILE CONVICTIONS

The presentence report prepared and submitted by the Oregon Probation Office for the use of Judge Gibson at the original sentencing in January, 1968 included, as part of Appellant's prior criminal record, the following:

JUVENILE

8/18/51 (age 13)	Linn Co., Iowa Juvenile Dept.	Larceny (shoplifting) and destruction of property. Referred to probation officer
2/8/52	Linn Co., Iowa Juvenile Dept.	Subject threatened his mother with a knife. Referred to probation officer
4/30/52	Linn Co., Iowa Juvenile Dept.	Disturbing the peace by fighting. Referred to probation officer
9/29/52	Linn Co., Iowa Juvenile Dept.	Larceny, fighting and intimidation. Committed to Iowa State Training School (subject paroled from this institution 11/24/53 to father and stepmother. Discharged 2/6/56).

The same report with the same inclusions was forwarded to Judge Coffrin for his use in resentencing Appellant. See letter from Paul J. Picher, Chief U.S. Probation Officer, District of Vermont, to the Honorable Albert W.

Coffrin, July 29, 1974; App. at 48

In support of Appellant's section 2255 petition, two affidavits were filed to establish that Appellant did not have the assistance of counsel during those juvenile proceedings. See Affidavit of Ronald R. Boyer, Chief Probation Officer, Linn County, Iowa, Apr. 1, 1974; Affidavit of Jack Rex Pigman, Apr. 10, 1974. (Documents 14 and 15, Record in Civil Action No. 73-236.)

Judge Coffrin stated on the record at resentencing that he was "eliminating from consideration" those four juvenile convictions Transcript of Resentencing 8 (Aug. 19, 1974); App. at 69, but then undertook affirmatively to consider them and give them substantial weight in determining Appellant's sentence:

> THE COURT: As part of the defendant's family background, I'm taking note of those convictions merely as a showing general pattern of instability in defiance of authority during the defendant's juvenile years, but just solely as the general pattern may disclose and not taking into fact that he was convicted without benefit of counsel.
>
> Id.

The United States Supreme Court has ruled that a defendant is entitled to resentencing where the initial sentence is demonstrably founded at least in part upon misinformation of constitutional magnitude or upon assumptions concerning a criminal record which are materially untrue. United States v. Tucker, 404 U.S. 443, 447-48 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948). In Tucker the respondent was held entitled to resentencing because the trial court in imposing sentence had given explicit attention to three previous felony convictions two of which subsequently were found to be constitutionally invalid under Gideon v. Wainwright, 372 U.S. 335 (1963).

The holding in Tucker was based squarely on Gideon v. Wainwright; resentencing was necessitated to prevent "[e]rosion of the Gideon principle...." United States v. Tucker, supra, 404 U.S. at 449. The Gideon principle is that the sixth amendment to the federal Constitution requires that in all felony prosecutions the accused shall have the right to have the assistance of counsel.

In re Gault, 387 U.S. 1, 41 (1967), applied the same principle of right to counsel to juveniles in delinquency proceedings which might result in commitment to an institution. It would be entirely inconsistent with the

Gideon principle and the protection afforded it by the Tucker decision to hold that a sentencing judge may give attention to a respondent's prior invalid juvenile convictions and enhance the punishment imposed as a result of those convictions. With respect to erosion of the right to counsel, it has been held that there is no difference between the sentencing judge incorrectly relying upon prior invalid felony convictions, United States v. Tucker, supra, and prior misdemeanor convictions, invalid under Argersinger v. Hamlin, 407 U.S. 25 (1972). See, e.g., Cottle v. Wainwright, 477 F.2d 269 (5th Cir. 1972); Ex parte Olvera, 12 Crim. L. 2428 (Tex. Ct. Crim. App., Jan. 31, 1973). A juvenile conviction obtained in violation of Gault and appearing in a pre-sentence report, is no less "misinformation of constitutional magnitude," United States v. Tucker, supra, 404 U.S. at 447, than is a conviction obtained in violation of Gideon.

Judge Coffrin, although stating he was not considering the invalid juvenile convictions as convictions, nevertheless explicitly noted those convictions as showing a "general pattern of instability in defiance of authority during the defendant's juvenile years." This

distinction may have had some validity prior to Tucker, as in Neely v. Quatsoe, 317 F. Supp. 40, 42 (E.D. Wis. 1970), where the court upheld the sentencing judge's consideration of juvenile commitments invalid under Gault because the commitments were indicative of a "pattern of behavior." After Tucker, however, the distinction is without a difference. The United States Supreme Court never has attached a qualification based on age to its holdings that convictions obtained without the provision for counsel for the accused may not be used to influence the determination of a discretionary sentence, United States v. Tucker, 404 U.S. 443 (1972), nor to enhance punishment under a recidivist statute. Burgett v. Texas, 389 U.S. 109 (1967).

> To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense (See Greer v. v. Beto, 384 U.S. 269) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffered anew from the deprivation of that Sixth Amendment right.
> Burgett v. Texas, 389 U.S. 109, 115 (1967).

It was "inherently prejudicial" in Burgett, supra, 389 U.S. at 115, for the jury to hear evidence of prior invalid convictions, and the error was not curable by

an instruction from the court that the jury disregard that evidence. Id. Similarly, in the instant case the constitutional error of allowing the sentence to be enhanced by prior invalid juvenile convictions cannot be cured by a statement from the judge, to the effect that the convictions are not convictions at all, but are something else merely representative of a "general pattern of instability in defiance of authority." It is the fact of consideration of the convictions and reliance upon them by the sentencing judge, rather than the label he gives them, that constitutes error. The illegal convictions clearly influenced and enhanced Appellant's punishment in violation of the sixth amendment and Supreme Court doctrine. Tucker therefore compels that Appellant Pigman be resentenced anew.

B. THE JUDGE'S CONSIDERATION ON RESENTENCING OF CONVICTIONS OBTAINED SUBSEQUENT TO THE ORIGINAL SENTENCING VIOLATES THE FIFTH AMENDMENT GUARANTEE THAT A SENTENCE MAY NOT BE INCREASED ONCE SERVICE OF IT HAS BEEN COMMENCED.

Subsequent to his original sentencing and while on parole, Appellant was convicted on pleas of guilty to two charges of breaking and entering in Linn County, Iowa district court. These convictions were the subject of Appellant's "Motion for Deletion..." filed in anticipation of Judge Holden's Order for Resentencing and denied by Judge Coffrin at the time of resentencing. (Document No. 20, Record in Civil Action No. 73-236).

In resentencing, Judge Coffrin gave explicit attention to those subsequent convictions, stating:

> It would be unrealistic in resentencing of this nature not to consider as stated in the (Pearce) case events which throw new light upon the defendant's health habits, conduct and mental and moral propensities particularly when considered as also stated in (Pearce) in light of prevalent modern philosophy of penology that the punishment should fit the defender (sic) and not merely the crime.
>
> Transcript of Resentencing 9, 10 (August 19, 1974), App. at 70, 71.

Ordinarily, "...a trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose...and may appropriately conduct an inquiry broad in scope largely unlimited either as to

the kind of information he may consider, or the source from which it may come." United States v. Tucker, supra, 404 U.S. at 446. See also 18 U.S.C. §3577 (1971); Williams v. New York, 377 U.S. 241 (1949). Thus, where an original conviction has been "wholly nullified and the slate wiped clean," upon retrial and reconviction the sentencing judge may -- without violating the double jeopardy clause of the fifth amendment -- resentence the respondent to a more severe sentence than that imposed after the first trial, provided statutory limits are followed and the factual basis for the increased sentence is made part of the record. North Carolina v. Pearce, 395 U.S. 711, 721-26 (1969). The factual basis for the more severe sentence may be, inter alia, evidence adduced at the second trial, a new presentence report, or the defendant's conduct subsequent to the first conviction. North Carolina v. Pearce, supra, 395 U.S. at 723.

In the instant case, which involves only resentencing, not sentencing after a retrial, however, it was error for Judge Coffrin to consider the subsequent convictions in determining Appellant's sentence. "It is a well settled general rule that increasing a sentence after the defendant has commenced to serve it is a violation of the constitutional guaranty against Double Jeopardy."

United States v. Sacco, 367 F.2d 368, 369 (2d Cir. 1966), citing Ex parte Lange, 18 Wall. 163 (1874); United States v. Benz, 282 U.S. 303, 307-309 (1931).

Thus, when a sentence, not the underlying conviction, is challenged successfully, a sentence more severe than the original may not be imposed upon resentencing, notwithstanding two intervening probation violations. United States v. Walker, 346 F.2d 428 (4th Cir. 1965). Nor may a sentence be increased even though the judge intended at the initial sentencing to decree a longer sentence but mistakenly did not, United States v. Sacco, supra; nor may the judge modify an oral sentence of concurrent sentences by a written order of consecutive sentences, on the premise he is "clarifying the record," Borum v. United States, 409 F.2d 433, 440 (D.C. Cir. 1967); nor, when resentencing on a challenged conviction is necessary, may the judge increase sentence on an unchallenged conviction so that the total term of imprisonment would be the same as that originally imposed. Chandler v. United States, 468 F.2d 834 (5th Cir. 1972); Whaley v. North Carolina, 379 F.2d 221 (4th Cir. 1967).

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party, when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.
>
> Ex parte Lange, supra, 18 Wall. at 168.

Appellant commenced serving his sentence in January, 1968. The duration of the sentence had to be reconsidered in 1974 because the sentencing judge relied upon impermissible factors in setting the term originally. But it is absolutely clear that Appellant had, within the meaning of Lange, commenced to serve his sentence for the crime committed. Only the exact length of the sentence has been subject to change since sentence was originally imposed. Judge Coffrin acknowledged this in his written resentencing order of August 19, 1974, which he entitled "Order Reducing Sentence" and in which he ordered that the sentence imposed January 22, 1968 "be modified" as set forth. Furthermore, on information and belief, the federal prison authorities are now holding Mr. Pigman

on the judgment commitment dated January 22, 1968. The original sentence, service of which was long ago commenced, is still being served, as modified.

It is inarguable that the only effect of the resentencing judge considering the subsequent convictions would be that the sentence imposed would be longer than what would be imposed in the absence of such consideration. Judge Coffrin's statements at page 11 of the August 19, 1974 transcript, App. at 72 amply support this conclusion. The Government, however, would be precluded by the jeopardy principle enunciated in Lange from reopening the sentencing process on its own motion to increase Appellant's sentence for any reason. That would be true no matter what Appellant's conduct had been since the original sentencing. There is, therefore, no rational basis for permitting the Government indirectly to increase a sentence being served, where the reopening of the sentencing process is made necessary by the illegality of the original sentence. United States v. Walker, 346 F.2d 428 (4th Cir. 1965).

Appellant's situation is not comparable to sentencing under a recidivist statute. There the punishment is imposed for the repetition of criminal conduct, not for prior offenses, and therefore double jeopardy does not

attach. See, e.g., Graham v. West Virginia, 224 U.S. 616 (1912); United States v. Brager, 474 F.2d 598 (5th Cir. 1973), cert. denied, 414 U.S. 846 (1974). To argue "repetition" in Appellant's case is to admit that the original sentence, once reopened and reexamined in light of subsequent convictions, will be enhanced in violation of Ex parte Lange, supra, since by definition the same statutory offense will be the basis for two punishments, the original and the second sentences.

Nor is Appellant Pigman's case within the North Carolina v. Pearce, 395 U.S. 711, 719 (1969), rule that the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction. The sentencing rule in that case is wholly dependent upon there being a reconviction; the power to impose a greater sentence after reconviction is "... a corollary of the power to retry a defendant...." 395 U.S. at 720. Where a new trial is held, the original conviction always has been "wholly nullified and the slate wiped clean." 395 U.S. at 721.

This premise of course does not pertain to a resentencing occasioned by the illegality of the original sentence. The slate is not wiped clean; the conviction is not set aside, nor is there a chance of acquittal. See United

States v. Walker, 346 F.2d 428 (4th Cir. 1965). The only "unexpired portion of the original sentence," 395 U.S. at 721, which will not be served is, analytically, that portion attributable to the influence of the various factors which the sentencing judge should not have considered, but illegally did, in imposing sentence.

By considering the subsequent convictions -- factors which of course were beyond those known by Judge Gibson or those extant but unknown to Judge Gibson -- Judge Coffrin permitted the severity of the sentence under service to be increased. To allow those convictions -- for which Appellant was tried and punished in state court -- to enhance his original sentence on the original facts of the original Count I is to impose double punishment upon him. Cf. In re Lamb, 34 Ohio App. 2d 85, 296 N.E.2d 280 (1973). It "... gives the Government 'continuing criminal jurisdiction' to supplement its case against the defendant, far beyond the cut-off date set by its original jurisdiction." North Carolina v. Pearce, supra, 395 U.S. at 736 n.6 (Douglas, J., concurring).

> It is doubtless true that the State has an interest in adjusting sentences upward when it discovers new evidence warranting that result. But the individual has an interest in remaining free of double punishment. And in weighing those interests against one another, the Constitution has decided the matter in favor of the individual.
>
> North Carolina v. Pearce, supra, 395 U.S. at 736-37 (Douglas, J., concurring).

Accordingly, Appellant should be resentenced with no consideration given to the convictions obtained subsequent to the original sentencing.

C. THE SENTENCING JUDGE'S RELIANCE ON THE TRIAL JUDGE'S ERRONEOUS RINGLEADER ACCUSATION DENIED APPELLANT DUE PROCESS OF LAW.

The transcript of the original sentencing reveals that Judge Gibson considered Appellant Pigman to be a ringleader of the group of co-defendants:

> THE COURT: Right, anyway, in my judgment, you constituted part, and were a leader, - you and Rathburn, were a leader of these five or more, I guess and the one or two more they didn't catch up with.
>
> MR. PIGMAN: I think the Court is assuming this, your Honor.
>
> THE COURT: Well, I'm not, - that is my judgment from watching you here and watching you during the trial, - that is my judgment, you and Rathburn were the ring leaders.
>
> MR. PIGMAN: Ring leaders?
>
> THE COURT: Right
>
> MR. PIGMAN: Ring leaders of what, your Honor?
>
> THE COURT: Of this whole scheme....
>
> Trial Tr. at 1085; App. at 64 .

Judge Coffrin, in resentencing Appellant on August 19, 1974, explicitly relied on Judge Gibson's opinion that Appellant was a ringleader. Transcript of Sentencing 10, 11 (Aug. 19, 1974; App. at 71,72. Judge Coffrin stated: "The weight and credibility to be afforded the evidence,

and the witnesses is particular for the evaluation of the trial judge in matters of this sort for obvious reasons." Id., at 10.

The transcript of the trial also clearly reveals that there was not one iota of evidence showing or tending to show, directly or indirectly, that Mr. Pigman was a leader of the group. No witness so testified. Mr. Pigman did not testify at the trial.

The only indication from any source that Appellant may have been a ringleader was the statement on page three of the original presentence report that "According to Kloberdance and Van Blericom this entire scheme was planned by Rathburn and Pigman." The statement continues in the same paragraph: "Rathburn directed that they hold up the restaurant chain.... Van Blericom and Kloberdance admit holding up six different restaurant outlets, obtaining about 200 Money Orders in all."

Judge Gibson's discussions with Van Blericom and Kloberdance, and the prosecutor's statements at the sentencing of Rathburn and Pigman show that the above statement is wrong and point to the conclusion that there was only one leader of this group, Rathburn. First, Judge Gibson asked Van Blericom only about Rathburn's influence over him, Trial Tr. at 1048; App. at 56, no inquiry was made as to

any leadership role played by Appellant. Importantly, however, Judge Gibson did ask Kloberdance whether Appellant Pigman was an instigator or leader:

> THE COURT: It looks to us like you are what we would term an anti-social being. Did Rathburn and Pigman instruct you to hold up the restaurants?
>
> MR. KLOBERDANCE: Rathburn did.
>
> THE COURT: Rathburn? Well, as I told Mr. Van Blericom, we are not going to... tolerate violence of this kind....
>
> Trial Tr. at 1061-62; App. at 59,60.

Judge Gibson, notwithstanding his surprise that only Rathburn was implicated as a ringleader by this codefendant, and that Pigman was excluded as a leader, did not pursue further the discrepancy between the presentence report and Kloberdance's statement.

The Government prosecutor, in his statements to the Court before the sentencing of Rathburn, called Rathburn the "motivating factor" behind the criminal scheme:

> There is no question in our mind, your Honor, that this Defendant was the motivating factor in bringing this group of people to Vermont. He had past associations here and had property here that he wished to pick up...
>
> We would submit that it was this man who was one of the ring leaders in this group....
>
> Trial Tr. at 1065; App. at 61.

Judge Gibson acknowledged that he believed Rathburn to be a leader of the group, telling Rathburn that the initial thefts were made "Under (his) guidance." Trial Tr. at 1068; App. at 62.

It is not clear why the prosecutor called Rathburn "one" of the leaders, but when Mr. Pigman was sentenced, the prosecutor did not label him as a ringleader. Rather, Appellant was described as beir "... involved in a group..." Trial Tr. at 1076; App. at 63. Despite Kloberdance's explicit statement that Rathburn, not Pigman, was the ringleader, and the prosecutor's failure to claim that Pigman was a ringleader, Judge Gibson accused Appellant of having been a ringleader. Trial Tr. at 1085; App. at 64. Appellant denied that he had been, as forcefully as he could under the circumstances. Id.

It is important to note that Judge Gibson did not mention to Mr. Pigman the presentence report portion quoted above in describing Appellant as a ringleader; rather he stated he was relying on "My judgement from watching you here and watching you during the trial, - that is my judgment, you and Rathburn were the ringleaders." Id.

While there was no evidence whatsoever that Appellant was a leader, substantial testimony directly implicated Rathburn as the leader of the entire group.

(1) Rathburn had worked or been in the shop from which the check protector (used in falsifying the stolen money orders) had been stolen; Pigman was unknown to the shop owner. Trial Tr. at 281.

(2) Rathburn had been living with the Van Blericoms for some time before the conspiracy commenced; the shotgun was kept there; Pigman never lived there and came there only shortly before the trip. Trial Tr. at 325, 328-330.

(3) Rathburn was identified as having a gun with him; Pigman never was so identified; Rathburn is the one who handled the money on the trip. Trial Tr. at 354, 374.

(4) Rathburn directed a participant to sign the stolen checks. Trial Tr. at 357.

(5) Rathburn alone had a motive for coming to Vermont, i.e., to recover property he had left there. Trial Tr. at 504.

(6) Rathburn, not Pigman, purchased guns with other participants in Montpelier (Rathburn used alias "Bill Collins"). Trial Tr. at 516.

(7) Rathburn's blue trunk, at his arrest, held a gun, the check protector, and blank Express Orders. Trial Tr. at 537-43.

(8) Other gun purchases were made by Rathburn ("Collins") not by Pigman. Trial Tr. at 734, 741, 746-50, 760-61.

(9) Rathburn ("Bill") and another exhibited their arsenal to Mrs. Lamphere; Pigman did not. Trial Tr. at 848-49.

(10) Rathburn registered at least at one motel. Trial Tr. at 893.

In factual summary, Judge Gibson's accusation that Appellant was a ringleader was erroneous. There was absolutely no evidence at the trial that Appellant was

a ringleader. The statement in the presentence report that he was a leader was directly negated in the colloquy between Judge Gibson and Kloberdance. Judge Gibson explicitly relied upon his belief that Appellant was a ringleader in giving Appellant three times as severe a sentence after trial as was imposed upon those codefendants (Van Blericom and Kloberdance) who pleaded guilty. Judge Coffrin in turn explicitly relied upon Judge Gibson's accusation that Appellant was a ringleader.

On the strength of United States v. Powell, 487 F.2d 325 (4th Cir. 1973), Appellant Pigman should be resentenced, with the resentencing court giving no credence to Judge Gibson's (and Judge Coffrin's) "ringleader" accusation. In Powell, Powell, his mother, and two of his brothers were indicted on several stolen motor vehicle counts. In a joint trial, Powell's mother was acquitted and his brothers were convicted; Powell was convicted in a separate trial.

The same district judge presided over both trials. Upon sentencing Powell, the judge commented:

> There is no question in my mind that (Powell) was the ringleader of the theft that involved his two brothers, that he was responsible for getting his two brothers in trouble. . . .
>
> 487 F.2d at 327.

Powell was sentenced to a prison term twice as long as that imposed on a brother who had been convicted under more counts than had Powell. The United States Court of Appeals for the Fourth Circuit found the reason for Powell's long sentence to be the trial judge's belief, ". . . that Powell was the ringleader of the auto theft group and that he led his brothers astray." 487 F.2d at 328.

In vacating and remanding for resentencing, the appellate court stressed two defects in the sentencing procedure, both of which exist in Mr. Pigman's case. First, the government was unable to point to any evidence in either of the trials establishing Powell as a ringleader. 487 F.2d at 329. Second, the district judge had disclosed his belief that Powell was the ringleader only after Powell's counsel had addressed the court and Powell had exercised his right of allocution. Furthermore, after disclosure, the court did not allow additional argument but immediately pronounced sentence, thus denying Powell "the opportunity to explain or refute the charge before he was sentenced." Id.

Relying throughout its decison on Townsend v. Burke, 334 U.S. 736, 741 (1948), United States v. Tucker, 404 U.S. 443, 447 (1972), and United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970), the court held:

> These two defects in the sentencing procedure -- failure of the record to support material factors on which the severity of the punishment rested, and Powell's lack of an opportunity to explain or refute the derogatory information on which the judge relied - denied Powell due process of law.
>
> 487 F.2d at 329.

Powell applies directly to Appellant Pigman's situation. There can be no question that the ringleader accusation was a material factor on which the severity of his punishment rested, under both Judge Gibson's and Judge Coffrin's sentences, according to the judges' own statements. There is also no question that no evidence adduced at trial showed Pigman to be a ringleader. Moreover, the presentence report was shown to be inaccurate by Kloberdance's statement implicating only Rathburn as a ringleader.

Nor was Appellant afforded a meaningful opportunity to refute the false accusation at either sentencing. Judge Gibson raised the allegation after Mr. Pigman's counsel had addressed the Court, during the Court's own interrogation which occurred immediately before sentencing. Judge Coffrin heard argument that Judge Gibson's ringleader accusation should not be taken into account on resentencing, see Transcript of August 6, 1974, at 4-5; App. at 65,66, but nevertheless relied entirely and specifically on Judge Gibson's statements at the

first sentencing ". . . for obvious reasons." Transcript of Resentencing, at 10 (Aug. 19, 1974); App. at 71 . Accordingly, there was no meaningful opportunity, at sentencing or resentencing, to refute the ringleader allegation.

The very nature of the accusation would have made it difficult to refute initially, and it became even more difficult when the matter came before Judge Coffrin. The latter is true because then the controversy became whether Pigman was telling the truth or whether the late Judge Gibson should be believed - even though the record supported Pigman. And by Judge Coffrin's statements, it was clear a request for a hearing -- with Kloberdance and Van Blericom present -- would have been refuted.

The end result is that the sentence imposed by Judge Coffrin was based on an assumption that was "materially false," Townsend v. Burke, 334 U.S. 736, 741 (1948), and was founded "in part upon misinformation of constituional magnitude." United States v. Tucker, 404 U.S. 443, 447 (1972). The "misinformation" here is of constitutional magnitude because no evidence supported the ringleader charge, the charge was false, the charge enhanced the severity of punishment imposed, and there was no meaningful opportunity to refute or explain the

charge, all of which combined to deny Appellant due process of law. United States v. Powell, supra.

This court has set forth at length its concern that fair procedures be followed at sentencing, especially in connection with disputes over the accuracy of presentence reports. See, e.g., United States v. Rosner, 485 F.2d 1213, 1229-31 (2d Cir. 1973); United States v. Needles, 472 F.2d 652, 656-59 (2d Cir. 1973); United States v. Malcolm, 432 F.2d 809, 816-19 (2d Cir. 1970). It is submitted that the Powell case is in accord with those decisions and that the rationale of Powell compels that the resentencing procedure followed below be held invalid. This is a case where a false, material, serious charge has been "manufactured," United States v. Needles, supra, 472 F.2d at 658, and where the "(f)air administration of justice" has been undermined because the resentencing judge acted on "surmise, misinformation and suspicion" passed on by the original sentencing judge. United States v. Malcolm, supra, 432 F.2d at 819.

Accordingly, resentencing should be accomplished by this Court, see United States v. Chiarella, 214 F.2d 838, 842 (2d Cir. 1954), or should be done by another judge under whatever conditions the Court deems necessary to insure fairness. See United States v. Rosner, supra, 485 F.2d at 1231, citing Mawson v. United States, 463 F.2d 29 (1st Cir. 1972).

D. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO CORRECT THE UNJUST DISPARITY BETWEEN APPELLANT'S SENTENCE AND THAT OF A CODEFENDANT WITH EQUAL CRIMINAL INVOLVEMENT AND A SIMILAR BACKGROUND.

Codefendants Kloberdance and Van Blericom, who plead guilty early in the trial, received sentences of five year's imprisonment on Count II, with five year's probation to be served thereafter on Count III. Count I was dismissed as to each. Appellant Pigman and codefendant Rathburn stood trial; on resentencing, Appellant received a nine year sentence of imprisonment.

The transcript of Van Blericom's sentencing is relatively silent concerning his past record, but the transcript of Kloberdance's sentencing shows that his background and criminal record were substantially similar to that of Appellant Pigman. For example, Kloberdance had an unfortunate family life, Trial Tr. at 1061; App. at 59 ; he did not have "too good a record, (having been) arrested for an assault with a dangerous weapon in 1964", Trial Tr. at 1059; App. at 57 ; he participated in the actual robberies in the instant case, Trial Tr. at 1060; App. at 58 ; and Judge Gibson described him as "an anti-social being." Trial Tr. at 1061; App. at 59 .

Moreover, Judge Gibson did not describe him as a minor offender, as he did Van Blericom. Trial Tr. at 1049.

The nine year sentence imposed upon Appellant Pigman by Judge Coffrin on August 19, 1974, is invalid, as argued elsewhere in this Brief, because of the judge's explicit and improper consideration of the invalid juvenile convictions, the subsequent convictions and the trial judge's false ringleader accusation. The nine year sentence is also invalid and should not stand because, by taking into account those improper considerations and especially the ringleader charge, Judge Coffrin in effect singled out Mr. Pigman for the imposition of a severe nine year sentence, nearly equal to that of Defendant Rathburn who, by every indication in the record, was in fact the ringleader.

The nine year sentence was imposed notwithstanding that Pigman's actual involvement in the criminal conduct, according to the record, was less than or equal to that of Kloberdance, who received only a five year sentence of imprisonment. Because their backgrounds, past criminal records and participation in the criminal conduct here were essentially coequal, the four-year disparity between Kloberdance's sentence and Pigman's sentence must have arisen from the judge's improper consideration of the false ringleader charge. This compels

that Pigman's sentence be "characterized as so manifest an abuse of discretion as to violate traditional concepts." United States v. Holder, 412 F.2d 212, 214 (2d Cir. 1969). Accordingly, this Court, "... pursuant to (its) power to supervise the administration of justice in the circuit, (should) ... intervene." Id., 412 F.2d at 214-15. See also United States v. Gargano, 388 F.2d 893, 897 (6th Cir. 1964) and cases there cited; United States v. Wiley, 278 F.2d 500, 503 (7th Cir. 1960).

In United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), on remand for resentencing from a prior appeal, the trial judge without stating reasons imposed the same sentence as the one rendered initially, which had been held improper as based on defendant's decision to stand trial rather than plead guilty. On the second appeal, the Court could not review the procedure followed by the trial judge, as it was unknown.

Faced with an obviously unfair sentence --- Wiley, an accessory with no past record, received three years, while McGhee, the ringleader with four prior felonies, received two years -- the appellate court set Wiley's sentence aside and remanded with directions for a reduced sentence. The important language in Wiley, which bears

particularly on Appellant Pigman's situation, reads:

> (W)here the facts appearing in the record point convincingly to the conclusion that the district court has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendant, this court will not hesitate to correct the disparity. In so doing it is exercising its supervisory control of the district court, in aid of its appellate jurisdiction. This control is necessary to proper administration of the federal system.
>
> 278 F.2d at 503.

Thus, should Mr. Pigman's nine year sentence be upheld under procedural scrutiny, this Court should exercise its supervisory power and, under substantive review, hold the sentence invalid because of the unreasonable and unfair disparity between Pigman's and Kloberdance's sentences.

The disparity between Kloberdance's and Pigman's sentences should be corrected by vacating Pigman's nine year sentence and imposing a sentence equal in duration to Kloberdance's. See United States v. McKinney, 466 F.2d 1403 (6th Cir. 1972); United States v. Chiarella, 214 F.2d 838, 842 (2d Cir. 1954). Remand for resentencing with a specific suggestion as to the proper duration would accomplish the same result. United States v. Griffin, 434 F.2d

740 (6th Cir. 1970), vacated on other grounds, 402 U.S. 970 (1971); United States v. Moody, 371 F.2d 688 (6th Cir. 1967), cert. denied, 391 U.S. 916 (1968).

If remand is ordered for resentencing without directions as to duration, resentencing should be done by a judge other than Judge Coffrin or Chief Judge Holden, inasmuch as their involvement with the case might make it impossible for them fairly to eliminate from consideration the factors which have rendered the ten and nine year sentences invalid. See United States v. Rosner, supra, 485 F.2d at 1231, citing Mawson v. United States, 463 F.2d 29 (1st Cir. 1972).

Finally, any presentence report used on resentencing should not contain references to the matters which were improper for Judges Gibson and Coffrin to consider in imposing sentence.

V. CONCLUSION

The Order Reducing Sentence dated August 19, 1974 should be vacated. Mr. Pigman should be resentenced to a term of five year's imprisonment, or alternatively, should be resentenced with no consideration given to the illegal juvenile convictions, the convictions obtained subsequent to the original sentencing, or to the trial judge's ringleader accusation.

DATED at the City of Rutland, County of Rutland, State of Vermont this 26th day of November, 1974.

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